REDUCED RATES FOR HOA BECAUSE IT MAINTAINS ITS OWN INFRASTRUCTURE?

Blair Atholl Homeowners Association v The City of Tshwane Metropolitan Municipality (20634/2014) [2015] ZASCA 195 (1 December 2015)

This matter relates to the homeowners' association and developer in an upmarket estate disputing why they were required to pay equivalent rates to property owners outside the estate when they maintain their own services in the estate. The Supreme Court of Appeal found that neither the Constitution, which gives municipalities the power to levy rates on property, nor the Rates Act links municipal property services with rates. It was thus not inequitable for the property owners to be charged equivalent rates to differently situated ratepayers.

The Judgment can be viewed here.

FACTS

The Blair Atholl Estate is an upmarket residential development 50 km from Pretoria. It is some 600 hectares in size and has 329 stands.

The development was approved as a township, subject to specific conditions as the relevant area fell outside the priority areas for the establishment of new townships of the City of Tshwane Metropolitan Municipality (the City) and had no water and sewerage services. Approval was given on condition that the developer installed these services.

To this end, in 2006, the developer and the City concluded an 'Engineering Services Agreement' (ESA) and the developer undertook to install all engineering services for which municipalities are usually responsible. The services included water, electricity, sewerage networks, storm water drainage systems and road infrastructure. The HOA, which establishment was one of the conditions in the ESA, became responsible for the maintenance of the services inside the estate. The residents, who are obliged to be members of the HOA, pay a monthly levy to it to cover these costs. The City maintains the services outside the estate, including the supply of water, for which the residents pay, but it does not raise sewerage charges.

What is thus unique about this development is that it provides for and maintains most of its own services at its own cost; it does not rely on the municipality as other ratepayers do. However, the property owners pay equivalent rates to other high value properties in the municipality's area.

The property owners considered that they should not have to pay equivalent rates to differently situated property owners and qualified for an exemption, reduction, or rebate in rates. They based their argument on, amongst others, section 3(3) of the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act), which calls for rates policies to be equitable, and which envisages a rates differentiation for different categories of properties. They argued that the municipality's rates policy was inequitable, and thus unlawful, because it imposed the same liability for rates on property owners of the estate as for other differently situated ratepayers.

The HOA and developer made representations to the City in 2011 to give them preferential treatment in the assessment of their rates, but this was unsuccessful. They then approached the Gauteng High Court for review and setting aside of the resolution of the City not to give preferential treatment to the property owners of the estate in its rates policy. The court found in favour of the City.

HELD:

Rates are levied on property and have no bearing on the services

- A council resolution on rates policy is a legislative decision taken by an elected body. It was therefore reviewable, not as an administrative action under PAJA, but only under the principle of legality on the grounds of irrationality.

- The power of municipalities to levy rates on property is an original power derived from section 229(1)(a) of the Constitution. Rates are levied on the value of property to cover the running costs of a municipality and to achieve its objects. The statute regulating the exercise of this power is the Rates Act. Section 3 regulates the adoption and content of rates policy. Section 3(1) imposes a duty on the council of a municipality to adopt a rates policy, and section 3(3)(a) requires the policy to be equitable. The principle underlying an equitable rates policy is that similarly situated ratepayers are liable for the same rates; and, where a policy differentiates between ratepayers, it must do so fairly.

- To this end, a rates policy must determine criteria if the council levies differential rates for categories of properties; exempts, reduces or grants a rebate to any category; or increases or decreases rates. It must also provide criteria for determining categories of properties liable for different rates. Fairness also entails any exemptions, rebates or reductions to be justified by reasons.

- Another aspect of the equitability principle is that rates policy must take into account its effects on the poor, on organisations that conduct public benefit activities and on public service infrastructure. The policy must also allow the municipality to promote

local social and economic development. This necessarily implies that some ratepayers – those who have the means to own more valuable properties – must perforce shoulder a heavier burden for these taxes.

- Another injunction in the Rates Act is that a rates policy providing for exemptions, rebates or reductions must comply with a national framework. This is to avoid the knock-on effect that a policy, which allows exemptions, reductions or rebates in one municipality, may have on other municipalities.

- The adoption of a rates policy is therefore quintessentially a political decision that involves balancing the interests of various parties. It is underpinned by the principle of equitability. And even though the adoption of a rates policy is subject to legal challenge for failure to adhere to this principle, the judicial branch of government will be circumspect before it interferes with a council's assessment of what is equitable.

- The HOA's argument incorrectly assumes that there ought to be a fair relationship between the services a municipality provides its ratepayers and the rates they are liable to pay. Section 229(1)(a) of the Constitution distinguishes between rates and surcharges: the latter may be imposed for services the municipality provides, while the former bears no such constraint. Ratepayers who have the means are required to bear an additional burden to subsidise those who cannot afford to pay for their services. Rates also support local social and economic development, unrelated to the provision of services.

- The City's policy document also eschews any link between rates and services.

The HOA's attempt to link services with rates therefore had to founder.

The specific complaint that the resolution does not factor in the peculiar context and geographic location of the Blair Atholl development

- The City's resolution does take the necessary factors into consideration. The City and the developer had entered into the EAS on the premise that the development would provide its own services as it fell beyond the reach of municipal services. The City agreed to supply water at the normal rate and not to levy a sewerage charge, but made no similar concessions for property rates. On the contrary, the agreement explicitly provided for rates to be levied from the date of the proclamation of the township.

- Thus there was no basis for any supposition on the part of the HOA supporting an

equitable claim to exemption from (or reduction of) rates in exchange for the provision of services by them.

The appeal was dismissed.

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